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Case No. 83-490

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, Appellants,

v.

GREGORY SCOTT SCHERER, Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

APPELLANTS' REPLY BRIEF

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APPELLANTS WERE ENGAGED IN DISCRETIONARY DUTY

Appellee argues that the Appellants, in failing to follow a departmental regulation, were divested of discretion to terminate this employee. The ultimate issue of whether to terminate this employee, based upon the facts presented to them, indicate the highest form of discretion necessary. To "fire" an employee is but a portion of the overall discretion possessed by the Defendants in exercising their disciplinary authority. Here, the Appellants substantially complied with the requirements of General Order 43. There was an "investigation" with notice to the Appellee. There was an opportunity for him to be heard and for the Appellants to consider his response. (6a - 9a) The Appellants knew that the Appellee's superiors had advised that a potential conflict

existed, ordered him to cease his secondary employment and that Scherer refused to quit his second job. When presented with those already ascertained facts, the Appellants exercised their discretion to terminate this insubordinate employee.

The finding that the Appellants are liable for damages because they failed to abide by their own regulations, after finding that there was no violation of any clearly established constitutional right, amounts to a finding of "administrative negligence" which "fails to state a claim cognizable under Section 1983" and which was condemned by this Court in Polk County v. Dodson, 454 U.S. 312 (1981). Furthermore, under Harlow v. Fitzgerald,457 U.S. 800 (1982) and Pennhurst State School and Hospital, et al. v. Terri Lee Halderman, et al., ____U.S.____ (Jan. 23, 1984), once the court determines that the actions of a

state official do not violate clearly established constitutional law, then the court is without jurisdiction to inquire further and should dismiss the Complaint. Without a finding that there was a violation of a clearly established constitutional right, subjecting the state official to a federal trial because of a failure to abide by a regulation (overlooked perhaps due to inadvertence, negligence or lack of knowledge) is contrary to Harlow and Pennhurst. Such trials could seriously "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties". Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), (Learned Hand, J.).

SCHERER WAS DISMISSED ACCORDING TO CLEARLY ESTABLISHED LAW

Appellee argues the case law at the time clearly established the right of a

governmental employee to pretermination procedures that were not provided to Plaintiff. This argument was first adopted (43a - 45a) and then rejected by the trial court (65a - 67a) based upon the intervening decision in Weisbrod v. Donigan, 651 F.2d 334 (5th Cir. 1981) which held that no clear constitutional right to a pretermination hearing existed in June, 1977.[1]

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[1]Also, the Weisbrod court determined that a wait of nine months for a full evidentiary hearing did not contravene any well established constitutional principles. Id. Appellee's brief (p. 20) expresses bewilderment over the trial court's adoption of Weisbrod as controlling without a discussion of the pertinent case law. The implication being that the case authority supporting the Plaintiff's position, particularly Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976), was not presented to the Weisbrod panel. In suggesting this interpretation of Weisbrod, counsel for Appellee is being disingenous. The law firm representing the Appellee here, Patterson and Traynham, also represented the Plaintiff in Weisbrod and knows that Thurston v. Dekle, as well as other cases, were submitted as authority for the Plaintiff's procedural

The conclusion from Weisbrod is that the Fifth Circuit did not consider Thurston v. Dekle as unequivocally establishing a constitutional right to a pretermination hearing in 1977. This reasoning is sound since Thurston v. Dekle was on petition for certiorori to this court until June 26, 1978.[2]

Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972) and other cases cited by Appellee only require that "some kind of a hearing" must be provided prior to depriving a person of a protectable property interest. Roth, supra

due process contentions in Weisbrod. See Principal Brief of Appellant at 27-28, and Reply Brief of Appellant at 8-10, Weisbrod v. Donigan, supra. Also, the trial court in Weisbrod had considered and expressly rejected the argument that Thurston clearly established the law. (66a)

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[2]This Court reversed on other grounds and remanded the case to the Fifth Circuit. 438 U.S. 901 (1978)

at 570, emphasis supplied. None specify what form of hearing is required. The Roth court expressly noted that:

> The formality and procedural requisits for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.

Id. at 571 n.8. The plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), indicated that:

> The nature of a [government employee's] interests in continued...employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords...no procedural protections...other than those expressly provided in the statute.

Id. at 166, Powell concurring in part. Thus, Arnett certainly cannot be interpreted as clearly establishing the law in the area.

In the instant case, there is no question that Scherer had notice of the charge

against him -- dual employment without permission and his insubordinate refusal to quit the second job -- during the thirty days between the date of his employer's denial of his request and the termination letter. (6a - 9a) Scherer responded to the charge through the chain of command both verbally and in writing. (Id.) In response to the statement of his Sergeant that he might be fired if he did not quit the job with the Sheriff, Scherer responded "I told him to fire me." (T. 75-76) Thus, Plaintiff received a "form of" pretermination hearing.[3] The manner in which Scherer's dismissal was carried out, therefore, was not contrary to any settled law regarding pretermination procedures.

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[3]This sort of informal counseling has been deemed to comport with due process. See Webb v. Dillon, 493 F.2d 656 (5th Cir. 1979).

EQUAL PROTECTION

Appellee argues that termination of Scherer's employment violated well-established equal protection principles. There was no mention of an equal protection claim and nor did the trial court rule on, or mention, this issue. This Court's Rule 10.5,[4] (which formalizes prior accepted practice allowing an appellee to argue alternative grounds for the judgment below, 13 Moore's Federal Practice, ¶810.04 (2d.Ed. 1982)), and Court Rule 15.1(a) do not authorize Appellee's equal protection argument.

> "It is the general rule ... that [the Court] does not consider an issue not passed upon below....[T]his is essential in order that parties may have the op-

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[4] "An appellee ... may defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted."

> portunity to offer all the evidence they believe relevant to the issues ....

Singleton v. Wulff, 428 U.S. 106, 120 (1976).

As an exception to that general rule, an appellee in this Court is permitted to argue in support of his judgment issues which the lower courts did not rule on; however the ground must have been "properly raised below." Washington v. Yakima Indian Nation, 493 U.S. 463, 476 n.20 (1979); See, Tennessee v. Dunlap, 426 U.S. 312, 314 n.2 and 316 n.3 (1976). Here, the equal protection claim was not raised at any time in the proceedings below and should not be heard here.

Furthermore, the equal protection claim does not qualify as an alternative argument in support of the judgment below which would not modify that judgment. If the judgment appealed from would be altered by

adopting Appellee's argument, such an argument is barred from consideration absent a cross-appeal.[5] In the words of Mr. Justice Brandeis:

> Appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary,...to supplement the decree with respect to a matter not dealt with below.

United States v. American Railways Express Company, 265 U.S. 425, 435 (1924). This court has rejected the theory that the "judgment" consists of simply the sum of money awarded without reference to the basis for that award. See Helvering v. Pfeiffer, 302 U.S. 247, 250-251 (1937); see F. Duriso v. K-Mart No. 4195, 559 F.2d 1274

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[5]Barry v. Barchi, 443 U.S. 55, 69 n.1 (1978); FEA v. Algonquin SNG Inc., 426 U.S. 548, 560 n.11 (1976); Mills v. Electric Auto-Lite Company, 396 U.S. 375, 381 n.4 (1970).

(5th Cir. 1977). The judgment below awarded Scherer damages because certain departmental procedures were not followed in firing him and not because of any violation of clearly established constitutional right.

If this Court were to discount the fact that Appellant's have not had a fair opportunity to defend against an equal protection claim, and proceed to weigh the evidence and adjudicate the cause of action, the only reasonable conclusion would be that no equal protection violation appears. Equal protection is not implicated unless the alleged discriminatory treatment is "patently arbitrary and bears no rational relationship to a legitimate governmental interest." Frontiero v. Richardson, 411 U.S. 677, 683 (1973). Appellee's equal protection argument derives from the fact that two officers in his troop were permitted to work the same type of second

employment that he was fired for doing. The significant difference between Scherer and those two officers was in their job classification. Scherer was one of a small number of radio operators in the troop. (T. vol. I 65-66) The other officers were troopers, of which there were many. (Id.) It was potentially much more disruptive to the troop for a radio dispatcher to be called away unexpectedly[6] because his position is so vital to the area law enforcement and public safety network and yet there were few dispatchers to call upon to fill the slot. More importantly, the Highway Patrol had little discretion to disallow the two officers

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[6]It was felt that with a second law enforcement job there was a substantial likelihood of the employee being subpoenaed and not able to work his assigned shift. (T. vol. I 217, T. vol. II 47, 56, 60, 61)

from working for the Sheriff as troopers enjoyed a right, established by collective bargaining contract, to work in other law enforcement positions. (T. vol. I 172, vol. II 101-102) No such provision applied to radio dispatchers. (T. vol. I 67, vol. II 101-102) Clearly then, there was a rational basis for the complained of differential treatment and, consequently, Scherer's rights under the Equal Protection Clause were not infringed.

It would expand that judgment for this Court to now hold, as Appellee asks, that the Highway Patrol's decision to deny Scherer permission to take a second job as a reserve deputy was a violation of equal protection. As a consequence, this Court should decline to delve into the factual and legal disputes of the equal protection issue.

THIS COURT HAS JURISDICTION TO DECIDE ALL FEDERAL QUESTIONS

Title 28 U.S.C. §1254(2) authorizes this Court to hear "the Federal questions presented" on appeal by these Appellants, since they are "relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . ." 28 U.S.C. §1254(2); Silkwood v. Kerr-McGee Corp., ____U.S.____, No. 81-2159 (Jan. 11, 1984), slip op. 7.

Once jurisdiction exists under 28 U.S.C. §1254(2), this Court may consider other pertinent "Federal questions" as was done in Abood v. Detroit Board of Education, 431 U.S. 209, 216, n.9 (1977) in intrepreting 28 U.S.C. §1257(c) and an appeal from a state court. Should the appeal be disposed of under §1254(2), the remain-

ing federal issues may be considered under 28 U.S.C. §2103.[7]

CONCLUSION

For the reasons delinated in the Appellant's initial brief, which have not been rebutted by Appellee, and for the reasons addressed in this Reply, the Court should find for the Appellants and reverse the finding that Appellant's actions authorize an award of damages against these state officials and rule that, absent a federal constitutional or statutory violation which must be protected, the District

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[7] Silkwood v. Kerr-McGee Corp., supra; Perry Education Ass'n v. Perry Local Educators' Ass'n, ____U.S.____, 74 L.Ed.2d 794, 803-804 (1983); El Paso v. Simmons, 379 U.S. 497, 501-503 (1965).

Court had no jurisdiction to inquire further.

Respectfully submitted,

JIM SMITH
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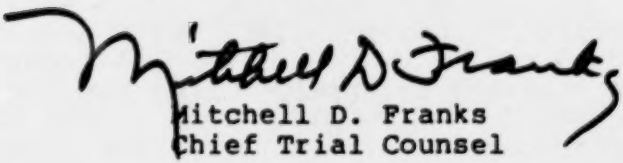

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS has been furnished by U.S. Mail to Ben R. Patterson, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303 and to Bruce S. Rogow, Nova University Law Center, 3100 S.W. 9th Avenue, Fort Lauderdale, Florida 33315, this 4th day of April, 1984.

Mitchell D. Franks